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Public Policy as Affecting Property Rights Accruing to a Party as a Result of Wrongful Acts.

RIGHTS ACCRUING UNDER LIFE INSURANCE POLICIES.

In a previous article has been considered the scope of public policy as bearing on the right of testamentary and intestate succession by a devisee or heir whose wrongful act has caused the death of the testator or ancestor. The present purpose is to discuss the effect of its principles on property rights accruing upon contracts of life insurance, when the death has been wrongfully caused.

Public policy will not relieve the insurer because of any trifling forms of misconduct on the part of the insured. Its rules do not extend to cases where the death of the insured has been caused or contributed to by his carelessness, not amounting to culpable neglect. Simple want of care is a cause of death covered by the policy. Accidentally taking an overdose of medicine and thus causing death does not prevent recovery even though the policy contains a clause disclaiming liability in case the insured should "die by his own hand."¹ Some cases have gone very far in this direction. In one case² the insurer was held liable although the insured, while sane, voluntarily administered carbolic acid to himself, because he did it not with intent to cause death but to frighten

¹ *Michigan Mut. L. Ins. Co. v. Naugle*, (1891) 130 Ind. 79, 29 N. E. 393. See also *Thaxton v. Metropolitan L. Ins. Co.*, (1906) 143 N. C. 33, 55 S. E. 419.

² *Courtemanche v. Supreme Court*, (1904) 136 Mich. 30, 98 N. W. 749.

his wife into giving him money. Even a "self-destruction, whether voluntary or involuntary, sane or insane" clause has been held not to include accidentally self-inflicted death.³ In the absence of proof of cause of death, natural or accidental cause will be presumed.⁴ Intemperance is another kind of misconduct not sufficient to avoid the policy, if there be no express stipulation.⁵

The more aggravated kinds of wrongful act will be separately dealt with in the paragraphs following.

Self-destruction, while insane, is to be considered like any other accident. Public policy does not apply at all.⁶ Even where there is a clause against self-destruction, not amounting to a "suicide, sane or insane" provision, recovery may be had.⁷ A "sane or insane" clause, however, is not against public policy⁸ and is a legitimate exception and defeats recovery, though the suicide occurred while the insured was insane, and though the policy be payable to a beneficiary with a vested right therein.⁹

All voluntary acts of self-destruction, but only such acts as are voluntary, are included in a plain suicide clause.¹⁰ It

³ *Knights Templars' Co. v. Crayton*, 110 Ill. App. 648, affirmed in 209 Ill. 550, 70 N. E. 1066.

⁴ *Knights Templars' Co. v. Crayton*, *ubi supra*; *Travelers Ins. Co. v. Nicklas*, (1898) 88 Md. 470, 41 A. 906.

⁵ See note by Henry Wade Rogers to *Davey v. Aetna L. Ins. Co.*, (1884) 20 Fed. 490.

⁶ *Horn v. Anglo-Australian Assur. Co.*, 30 L. J. Ch. 511.

⁷ *Life Ins. Co. v. Terry*, (1872) 15 Wall. 580; *Supreme Council v. Pels*, (1904) 209 Ill. 33, 70 N. E. 697; *Robson v. United Order*, (1904) 93 Minn. 24, 100 N. W. 381 (beneficiary); *St. Louis Ins. Co. v. Graves*, (1869) 69 Ky. 268; *Van Zandt v. Mut. Ben. Co.*, (1873) 55 N. Y. 169; *Meacham v. N. Y. St. Mut. Ben. Assn.*, (1890) 120 N. Y. 242, 24 N. E. 283. See *contra dictum* in *Hartman v. Keystone Ins. Co.*, (1853) 21 Pa. St. 466. *Clift v. Schwabe*, (1846) 3 C. B. 437, holds that a plain suicide clause includes all acts of voluntary self-destruction. *Borrodaile v. Hunter*, (1843) 5 Man. & G. 639, holds that a "die by his own hand" clause includes all acts of voluntary self-destruction, even though the insured was incapable of distinguishing between right and wrong.

⁸ *Northwestern Ins. Co. v. Churchill*, 105 Ill. App. 159, 164, *Bigelow v. Berkshire Ins. Co.*, (1876) 93 U. S. 284; *Plunkett v. Supreme Conclave*, (1906) 105 Va. 643, 55 S. E. 9; *Cady v. Fidelity & Cas Co.*, (1907) 134 Wis. 322, 113 N. W. 967.

⁹ *Mut. L. Ins. Co. v. Kelly*, (1902) 114 Fed. 268; *dictum* in *Mut. Reserve Fund L. Assn. v. Payne*, (1905) (Tex.) 32 S. W. 1063.

¹⁰ *Borrodaile v. Hunter*, *supra*; *Clift v. Schwabe*, *supra*; *St. Louis Ins. Co. v. Graves*, (1869) 69 Ky. 268.

is not enough that the insured could not distinguish between right and wrong;¹¹ he must be unable to understand "the moral character, the general nature and consequence of the act" or "be impelled thereto by an insane impulse, which he has not the power to resist."¹² Even a "sane or insane" clause has been held not to include death by act of the insured without any mental impulse of self-destruction, e. g., in a fit of delirium.¹³ It is necessary to go further than merely to show insanity.¹⁴

Where the insurance is effected with the design of committing suicide there can be no recovery, but this rests on grounds of fraud, not of public policy. The defense is available, of course, even as against a beneficiary with a vested property right.¹⁵

The scope of public policy in case of suicide is best seen where the policy is silent on the subject. Although there are many and respectable authorities directly to the contrary, it is submitted that the proper rule is to allow a recovery even though the policy is payable not to a beneficiary but to the estate of the insured. Followed to its logical conclusion, this theory includes the proposition that there is no room for public policy in considering the cause of death where the matter is not provided for in the policy. Or, perhaps, it would be more accurate to say that there is a superior public policy which requires the insurer to provide in the policy against wrongful act of the insured, if it proposes to stand on that as a defense. Public policy can nullify express provisions in a contract which contravene its principles, but it does not necessarily follow that public policy can insert provisions omitted from the contract. An immoral provision may be rejected, but a moral one cannot be injected, although that were to achieve precisely the same result.

¹¹ *Van Zandt v. Mut. Ben. L. Ins. Co.*, (1873) 55 N. Y. 169. Contra, *Borrodaile v. Hunter*, *supra*.

¹² *L. Ins. Co. v. Terry*, (1872) 82 U. S. 580; *Supreme Council v. Pels*, (1904) 209 Ill. 32, 70 N. E. 697; *Fowler v. Mut. L. Ins. Co.*, (1870) 4 Lans. (N. Y.) 202; *Meacham v. N. Y. Mut. Ben. Assn.*, (1890) 120 N. Y. 242, 24 N. E. 283.

¹³ *Cady v. Fidelity & Cas Co.*, (1907) 134 Wis. 322, 113 N. W. 967.

¹⁴ *Dean v. Mut. L. Ins. Co.*, (1862) 4 Allen 96.

¹⁵ *Smith v. National Ben. Socy.*, (1890) 123 N. Y. 85, 25 N. E. 197.

But be this as it may, there are other reasons, arising from the peculiar nature of life insurance, which should prevent the courts from denying recovery in such cases. No one would deny that a man who intentionally burned his building or scuttled his vessel could not under any conditions collect fire or marine insurance. But to say that a fortiori a man who intentionally causes his death forfeits life insurance is to indulge in an unsound parity of reasoning. In the case of life insurance the loss can only occur by the death of the insured, and when he is dead he cannot in any legal sense of the term be said to be benefited by his misconduct though the insurance money be paid to his estate or to the beneficiaries of the policy. The defense of public policy is not, like that of fraud in the procurement, given for the benefit of the insurance company. To deny a recovery in such cases is to punish the innocent—the next of kin and creditors, or the beneficiaries. That is a strange public policy which visits upon the innocent, the sins of the guilty. The rule that an assignee must stand in the shoes of his assignor and submit to defenses valid as against the assignor, of course, does not apply. The beneficiary of a regular policy has a vested interest prior to the wrongful act. In any event the liability of the insurer does not arise until the death of the insured. As there is never any liability to him so there is never any defense valid as to him which can attach to his assignee or successor.

Another peculiarity of life insurance which makes it unsafe to reason from the rule to be applied to other forms of insurance is that it is not properly insurance or indemnity at all, but a contract made for the payment of a fixed amount whatever may be the actual value of the life or the extent of the loss suffered by the assured.

A further argument, perhaps not equally cogent, but not without weight, against the extension of this rule to life insurance, is that in life insurance as in no other form of insurance, the premiums are based on the inevitable ultimate happening of the event insured against. Take any other form, fire, accident, marine, what you will, the event is not only not bound to happen sooner or later, but in all probability it never will happen at all. But may the life insurer, having accepted premiums based on the inevitable happening of the

event, deny liability from a cause not expressly excepted in the contract which it has prepared with the greatest particularity? Would not a saner public policy require the insurer to express all risks excepted? It has been held that the insurer is not required to refund the premiums paid although it maintains the particular defense, where it admits the general validity of the policy.¹⁶

Looking at the matter from the viewpoint of the insurer, the conduct of the insured would seem to approach the fraudulent, or at least not to conform with that extraordinary good faith required of parties to the insurance contract. But it must be remembered that the insurer prepares the contract and might easily include an anti-suicide clause among its host of other clauses. Policies, of course, are to be construed liberally in favor of the insured and strictly against the insurer. The omission of such a clause allows solicitors to point out the superior liberality of the policy. The average person would be impressed by such an argument, little supposing that the law would imply such an exception against him on a ground so little understood even by jurists as public policy.

The authorities on this question of the disposition of insurance where the insured has committed suicide while sane, the policy being silent as to suicide, are hopelessly in conflict. The leading case is *Ritter v. Mutual L. Ins. Co.*¹⁷ decided in 1897. One Runk, heavily in debt and an embezzler, effected insurance and deliberately committed suicide in an effort thus to protect those whose trust he had betrayed. The amount of the insurance was five hundred thousand dollars, the premiums on which far exceeded his total income, and was payable to his estate. The court held the insurer not liable, upon the ground that there is implied by public policy an exception that the company will not be liable for death caused by the intentional wrongful act of the insured. The case was undoubtedly correctly decided, but the ground on which the decision was rested, implied exception, is exceedingly questionable, and mere dictum on the part of Mr. Justice Harlan, who

¹⁶ *Mut. L. Ins. Co. v. Kelly*, *supra*.

¹⁷ (1898) 169 U. S. 139. See also *Rudolph v. United States*, 36 App. D. C. 379.

wrote the opinion. It was a clear case of fraud in the procurement of the contract. Another weighty objection to the ground on which this case was decided is that it is based on the false assumption that the experience tables by which the premiums are determined exclude suicide as a cause of mortality.¹⁸

The rule of implied exception was not always the view of the United States Supreme Court. The Pennsylvania Supreme Court in 1853 made the statement that "if no such condition had been inserted in the policy, a man who commits suicide is guilty of such a fraud upon the insurers of his life that his representatives can not recover for that reason alone."¹⁹ This case was commented upon by the United States Supreme Court in 1872 by Mr. Justice Hunt, who described the language quoted from the Pennsylvania decision as "the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy."²⁰

Fifteen years prior to the Ritter case the question came up before the Alabama Supreme Court and it was held that voluntary self-destruction was an implied exception.²¹ The insurance was in the form of a mutual benefit certificate payable to a beneficiary. The possible bearing of this was not discussed.

Yet it is a very important matter. The great weight of authority is to the effect that where there is a beneficiary with a vested interest, the policy is not avoided, in the absence of special provision, as against such beneficiary by the intentional suicide of the insured.²² Many cases lay down the

¹⁸ See *Lange v. Royal Highlanders* (1905) 75 Neb. 88, 106 N. W. 224, affirmed in 110 N. W. 1110; *Campbell v. Supreme Conclave*, (1901) 66 N. J. L. 274, 49 Atl. 550.

¹⁹ *Hartman v. Keystone Ins. Co.*, (1853) 21 Pa. St. 466.

²⁰ *Life Ins. Co. v. Terry*, (1872) 15 Wall. 580, 586.

²¹ *Supreme Commandery v. Ainsworth*, 71 Ala. 436. See also *Hunziker v. Supreme Lodge*, (1904) 117 Ky. 418, 78 S. W. 201.

²² *Fitch v. Am. Pop. L. Ins. Co.*, (1874) 59 N. Y. 557; *Patrick v. Excelsior L. Ins. Co.*, (1875) 67 Barb. 202; *Goodwin v. Provident Assur. Socy.*, (1896) 97 Ia. 226, 66 N. W. 157; *Seiler v. Economic L. Assn.*, (1898) 105 Ia. 87, 74 N. W. 941; *Morris v. State Mut. L. Assur.*, (1898) 183 Pa. St. 563, 39 Atl. 52; *Shipman v. Protected Home Circle*, (1903) 174 N. Y. 398, 67 N. E. 83.

same rule as to beneficiaries without a vested interest.²³ These cases show the prevalence of a different view of public policy from that entertained in the Ritter case, and one which has been growing steadily. The attempted ground of distinction (that in the Ritter case the insurance was payable to the estate of the insured) is unwarrantable. If Mr. Justice Harlan stated the law when he said in the Ritter case that intentional suicide is an excepted risk, it would, like all other excepted risks, be a valid defense against a beneficiary or anyone else suing on the policy. One case alone holds that such misconduct of the insured defeats a recovery by a beneficiary with a vested interest.²⁴ Yet this is the only logical conclusion from the language of the Ritter case, and the cases *contra* disapprove of the language of the Ritter case in fact, however much they praise it in words. The approval can extend only to the decision, that there can be no recovery where there was fraud in the procurement, and not to the ground on which it was rested, that intentional suicide is an implied exception. The better reasoned cases are perfectly frank in their criticism of the Ritter opinion.²⁵

²³ *Mills v. Rebstock*, (1882) 29 Minn. 380, 13 N. W. 162; *Kerr v. Minn. Mut. Ben. Assn.*, (1888) 39 Minn. 174, 39 N. W. 312; *Darrow v. Family Fund Socy.*, (1889) (N. Y.) 22 N. E. 1093; *Supreme Lodge v. Trebbe*, 74 Ill. App. 545 (reversed on another ground, (1899) 179 Ill. 348, 53 N. E. 730); *Parker v. Des Moines Life Assn.*, (1899) 108 Ia. 117 78 N. W. 826; *Supreme Conclave v. Miles*, (1901) 92 Md. 613, 48 A. 845; *Supreme Lodge v. Underwood*, (1902) 3 Neb. unof 798, 92 N. W. 1051; *Grand Legion v. Beatty*, (1906) 224 Ill. 346, 79 N. E. 565; *Lange v. Royal Highlanders*, (1907) 75 Neb. 188, 110 N. W. 1110. The following cases hold that while a beneficiary with a vested interest may recover, the beneficiary of a mutual benefit contract may not: *Supreme Lodge v. Kutscher*, 72 Ill. App. 462 (reversed on another ground, (1899) 179 Ill. 340, 53 N. E. 620); *Mooney v. A. O. U. W.*, (1903) 114 Ky. 950, 72 S. W. 288.

²⁴ *Hopkins v. Northwestern Life Assur. Co.*, 94 F. 729.

²⁵ *Campbell v. Supreme Conclave*, (1901) 66 N. J. L. 274, 49 Atl 550; *Morton v. Supreme Council*, (1903) 100 Mo. App. 76, 73 S. W. 259; *Lange v. Royal Highlanders*, (1905) 75 Neb. 188, 106 N. W. 224, Affirmed, (1907) 75 Neb. 188, 110 N. W. 1110; *Patterson v. Natural Premium Ins. Co.*, (1898) 100 Wis. 108, 75 N. W. 980; *Darrow v. Family Fund Socy.*, (1889) 116 N. Y. 537, 22 N. E. 1093; *Robson v. United Order*, (1904) 93 Minn. 24, 100 N. W. 381.

The holding of the Alabama court that voluntary suicide is an implied exception is, like the similar holding in the Ritter case, unnecessary to the decision, as the contract was expressly made subject to change of by-laws, and a by-law was adopted prior to the suicide denying liability in case of self-destruction, sane or insane.

If there is a public policy which prevents recovery by the estate of the insured, but which does not extend to the innocent beneficiary, it certainly is not in the form of an implied exception. The reasoning of the cases holding that there is an implied exception is usually based on the premise that a clause frankly guaranteeing recovery to the estate of the insured although he should deliberately commit suicide while sane would be void on grounds of public policy as promoting suicide. It is curious that this has never been directly held, and a provision that, notwithstanding suicide, the policy should remain in force to the extent of any bona fide interest which may have been acquired by any other person by actual assignment for consideration or by way of security or indemnity has been upheld, the encouragement to suicide being considered very remote and improbable.²⁶ Similarly a recovery is allowed notwithstanding suicide where the policy contains a non-contestable clause.²⁷ These exceptions show the weakness of the public policy. If public policy forbids suicide as a risk, a non-contestable clause could not waive it. It has even been held in a recent case that a statute providing that death by suicide shall release the insurer is not based on public policy and may be waived.²⁸

The growing feeling against forfeiture for suicide is seen in the statutes enacted in several of the states which provide that suicide shall be no defense unless contemplated at the time of taking the insurance, whatever the terms of the policy. Such statutes have been held constitutional.²⁹

²⁶ Moore v. Woolsey, (1854) 4 El & B. 243.

²⁷ Goodwin v. Provident Assur. Socy., (1896) 97 Ia. 226, 66 N. W. 157; Starck v. Ins. Co., 7 Pa. Co. Ct. R. 511; Mut. Reserve Fund L. Assn. v. Payne, (1895) (Tex.) C. A., 32 S. W. 1063; Royal Circle v. Acterrath, (1903) 204 Ill. 549, 68 N. E. 492; Seiler v. Economic L. Assn., (1898) 105 Ia. 87, 74 N. W. 941.

²⁸ Mut. L. Ins. Co. v. Durden, (1911) 9 Ga. App. 797, 72 S. E. 295.

²⁹ Modern Brotherhood v. Lock, (1912) 22 Colo. App. 409, 125 Pac. 556.

It has often been urged that suicide is within a "violation of law" clause. Suicide, while a felony at common law, has not been made a crime by the statutory law of a number of the states, and in such jurisdictions suicide is not within a "violation of law" clause, even though attempted suicide may be a crime.³⁰ But even in such states, if the suicide has occurred outside the jurisdiction, the familiar presumption, which exists in most states other than California, that the law of a sister state is the same as the common law, is effective, in the absence of proof to the contrary, to bring suicide within such a clause.³¹ But on the other hand it has been held in Wisconsin that though suicide is there still technically a crime it is not a crime in the ordinary sense or by any usual definition, because there is no statute punishing it, and that therefore it does not come within such a clause.³²

The defense that the death was caused by execution for crime when argued on broad grounds of public policy has met with varying success. In a case which arose in the Court of Chancery in 1827, where the contract contained no special stipulation, execution for a capital crime was held not to relieve the insurer from liability.³³ The basis of the decision was that the act of the insured causing the death must "be done fraudulently, for the very purpose of producing the event." The case was taken to the House of Lords under a different name, and the judgment was reversed.³⁴ The rule was laid down that it is against the policy of the law that either the insured or those claiming in his right should recover for a loss caused solely by his criminal act, and that death at the hands of justice is so caused. This case has become famous under the name of *Fauntleroy's Case*.

³⁰ *Royal Circle v. Achterrath*, (1903) 204 Ill. 549, 68 N. E. 492.

³¹ *Shipman v. Protected Home Circle*, (1903) 174 N. Y. 398, 67 N. E. 83.

³² *Patterson v. Natural Premium Ins. Co.*, (1898) 100 (Wis.) 118, 75 N. W. 980.

³³ *Bolland v. Disney*, (1827) 3 Russ. 351.

³⁴ *Amicable Socy. v. Bolland*, (1830) 2 Dow & Cl. 1, 4 Bligh N. S. 194.

The fame of a case often springs from the surprise with which the profession greets an unsound principle. That the principle of this case was considered doubtful is attested by the fact that it led to the custom of inserting a "death at the hands of justice" clause.

The leading case on this subject is *Burt v. Union Central L. Ins. Co.*, decided by the United States Supreme Court in 1902.³⁵ Unlike *Fauntleroy's Case*, the plaintiff was not the assignee of the insured but of the beneficiary, and can therefore hardly be regarded as standing in the shoes of the insured. It was held that public policy would forbid the insertion of a stipulation promising payment in spite of execution for crime and that therefore the contract, though not containing the stipulation could not be enforced in that event. Like the *Hopkins* case, it seems to be a legitimate application of the theory of implied exception, and to be out of line with the great weight of authority found in the state reports. The fact that the assignment took place before the commission of the crime for which the insured was executed should be immaterial if the policy is to be viewed as containing an implied exception.

One of the contentions in the *Burt* case was that there had been a miscarriage of justice in the criminal case. But the court refused to consider the correctness of the conviction on the ground that contracts cannot be based on the probability of judicial murder, as that would encourage a want of confidence in the courts and partake of the element of wager. Even if sound on the other point, the case is unquestionably wrong on this. No judgment is conclusive in a suit between other parties.

The *Burt* case was followed in 1905 in one of the inferior courts of Pennsylvania.³⁶ The case is equally objectionable on the question of *res adjudicata*, but perhaps a trifle less so on the other point, as the policy was payable not to a beneficiary but to the estate of the insured. Even an incontestable clause was held not to preclude the defense.

³⁵ (1902) 187 U. S. 362.

³⁶ *Collins v. Metropolitan L. Ins. Co.*, 27 Pa. Super. Ct. 353.

The same question between the same parties and on the same policy came up for the consideration of the Illinois Supreme Court three years later.³⁷ The objection of *res adjudicata* was overruled (as the pleadings did not show that the Pennsylvania action had been pursued to final judgment). The court allowed recovery and distinguished *Fauntleroy's* case on the ground that forfeitures were at that time recognized in England, and on the ground that that case, while showing the public policy of England, did not voice the public policy of any other nation. The case probably goes too far in holding that the defense contemplates a forfeiture of property (it is rather a question of whether a recovery is to be allowed where a condition precedent to the liability has been caused by the unlawful act of one of the contracting parties, to state it in its strongest terms), but the case is authority for the proposition that there is no clear public policy implying such an exception and that doubtful public policy should be without efficacy.

The fact that the public policy relied upon by the United States Supreme Court is not the public policy of all the states has been conceded in the federal courts and the rule adopted that they must not set up a superior public policy of their own but must recognize that of the states. Thus in *McCue v. Northwestern Mut. L. Ins. Co.*,³⁸ a suit by the representatives of an insured who was executed for the murder of his wife, the court, considering the policy of a Wisconsin contract, decided for the plaintiff on the theory that the insurer had been incorporated by the Wisconsin legislature with power to assume all life risks and that it would be indulging in judicial legislation for the state of Wisconsin if they added to the corporation charter "except those arising from suicide or hanging." The *Burt* case was held not controlling because the federal courts must follow the public policy of the state where they are located in regard to contracts made under the laws of that state. The Wisconsin cases were shown to be directly opposite to the *Ritter* and *Burt* cases. The *McCue* case was,

³⁷ *Collins v. Metropolitan L. Ins. Co.*, (1907) 232 Ill. 37, 83 N. E. 542.

³⁸ (1908) 167 F. 435.

however reversed by the Supreme Court.³⁹ But the ground of reversal was that the policy was a Virginia, not a Wisconsin, contract, and that the public policy of Virginia (as established in *Plunkett v. Supreme Conclave*,⁴⁰) unlike that of Wisconsin, prevents recovery in such cases. This does not disturb the holding of the Circuit Court of Appeals that the federal courts must recognize the public policy of the states.

In an early Massachusetts case⁴¹ arose the question whether public policy prevents recovery where the death occurs as a result of, or while insured is engaged in, violation of law. It was an action by the beneficiary against one of the underwriters of a policy on the life of the beneficiary's brother, who died off the coast of Africa where the vessel on which he was employed had gone to procure slaves, and where he had purchased some of the slaves himself. The court held that the objection could not prevail to the prejudice of the beneficiary who did not participate in or know of the illegal employment and that though a policy made for the purpose of enabling a man to commit crimes would undoubtedly be void, one honestly made is not affected by the moral conduct of the party who procured it.

It has elsewhere been held that fraud but not public policy will defeat a recovery in such cases.⁴² Even to bring a case within a violation of law clause it must be shown that the unlawful act brought about the death.⁴³

Death as a result of an illegal operation is within such a clause.⁴⁴ The two cases cited are placed on broad grounds of public policy, but, it is submitted, they were improperly put upon this ground. Both policies sued on contained "illegal act" clauses, and as it is illegal to submit to, as well as to perform,

³⁹ (1912) 223 U. S. 234.

⁴⁰ (1906) 126 Ga. 334, 55 S. E. 11.

⁴¹ *Lord v. Dall*, (1815) 12 Mass. 115.

⁴² *McDonald v. Triple Alliance*, (1894) 57 Mo. App. 87.

⁴³ *Interstate Assur Co. v. Dalton*, (1908) 165 F. 176; *Goetzmann v. Conn. Mut. Ins. Co.*, (1875) 3 Hun 515; *Baker v. Supreme Lodge*, (1913) (Miss.), 60 So. 333; *Empire L. Ins. Co. v. Einstein*, (1913) (Ga.) 77 S. E. 209.

⁴⁴ *Hatch v. Mut. L. Ins. Co.*, (1876) 120 Mass. 550; *Wells v. New England Mut. L. Ins. Co.*, (1899) 191 Pa. St. 207, 43 A. 126.

a criminal operation the cases could have been decided on that ground.

In a great many cases the death has been caused by the misconduct, not of the insured, but of a third person. It is too plain to require discussion that public policy does not intervene to relieve the insurer where the death has been caused by the misconduct of a stranger. The insurer is not subrogated to rights against the wrongdoer.⁴⁵ The reason, an historical one, has ceased to exist, but the rule remains and has even been extended to accident insurance,⁴⁶ to which the reason never applied.

One of the most forcible arguments against declaring a forfeiture where the misconduct is that of the insured fails where it is that of a third person interested in the policy. While the maxim, "*nullus commodum capere potest de injuria sua propria*," is, perhaps, of somewhat limited application, it is well established and should prevent recovery on a policy by a beneficiary who has intentionally killed the insured. As already pointed out, a dead man can take no "commodum." No right accrues on a life policy until the death of the insured. Where the misconduct is his, he is beyond the capacity of taking "commodum" before the right accrues. But when the misconduct is that of the beneficiary the maxim does apply, and not only to him but to anyone claiming through him. However the "injuria" must be an intentional wrongful killing, (whether or not for the purpose of collecting the insurance), not merely a wrongful killing. Accidental homicide, no matter how wrongful, no matter how criminal the negligence, is not enough.

The nature of the beneficiary's interest must be kept in mind. Except in Wisconsin, the beneficiary of a policy, as distinguished from a mutual benefit certificate, has a vested property right in the contract which, unless otherwise specially provided therein, cannot be defeated without his consent.⁴⁷

⁴⁵ *Conn. Mut. L. Ins. Co. v. N. Y. etc. R. Co.*, (1856) 25 Conn. 265; *Ins. Co. v. Brame*, (1887) 95 U. S. 754.

⁴⁶ *Aetna Ins. Co. v. Parker*, (1903) 96 Tex. 287, 72 S. W. 168.

⁴⁷ See Vance on Insurance, pp. 390 et seq. and cases cited.

But the nominee of a mutual benefit certificate has not such right even though he pays the dues⁴⁸ or has possession of the certificate.⁴⁹

It is clear that the maxim would not apply to a killing by the beneficiary while insane although under such circumstances as would cause the killing to be murder if the beneficiary were sane.⁵⁰

The important question is whether the estate of the insured can recover, it being generally admitted that the sane beneficiary cannot. It first presented itself in England in 1858.⁵¹ The insured in that case, however, never had any interest in the policy which had been taken out by his brother. There was fraud in the procurement, the insurance having been effected as part of a deliberate plan to defraud the insurer by the murder of the insured, and it was very properly decreed that the policy should be delivered up to be canceled. The policy at no time having been valid, the insurer was not allowed to keep the premium, which was dissipated in paying costs.

The next case,⁵² one in the federal courts in 1878, is also unsatisfactory as bearing on the right of the estate of the insured. It has been cited as standing for the proposition that the insurer is not liable where the beneficiary has murdered the insured, but it actually holds simply that the beneficiary cannot recover under such circumstances. The estate of the insured made no claim.

In 1866 the question was presented to the United States Supreme Court.⁵³ One Hunter took out a policy on the life of Armstrong, in form as if issued to Armstrong and assigned to him, Armstrong submitting to the medical examination and executing the assignment, but Hunter paying the premiums. Two months later Hunter murdered Armstrong, and the suit was brought by Armstrong's widow. Recovery had been allowed below on the ground that the policy was non-assignable.

⁴⁸ *Grand Lodge v. McGrath*, (1903) 133 Mich. 626, 95 N. W. 739.

⁴⁹ *Masonic Assn. v. Bunch*, (1892) 109 Mo. 560, 19 S. W. 25. But see *Hill v. Groesbeck*, (1901) 29 Colo. 161, 67 Pac. 167.

⁵⁰ *Holdom v. A. O. U. W.*, (1895) 159 Ill. 619, 43 N. E. 772.

⁵¹ *Prince of Wales As. Co. v. Palmer*, (1858) 25 Beav. 605.

⁵² *Prather v. Mich. Mut. L. Ins. Co.*, (1878) Fed. Cas. 11, 368.

⁵³ *N. Y. Mut. L. Ins. Co. v. Armstrong*, (1886) 117 U. S. 591.

The Supreme Court reversed the decision, holding the policy to be assignable. Even if there were no fraud in the procurement of the policy—as the evidence tended to show there was—it seems clear that the representative of the assignor would have no right of recovery. The case is almost invariably cited for the rule that an assignee who has murdered the insured cannot recover, and the words of Mr. Justice Field that “it would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he has feloniously taken” have been repeatedly quoted with approval. The words are mere extrajudicial excursion, and the case does not stand for the rule stated. Neither Hunter nor anyone representing him was before the court. The rule is undoubtedly sound, but the cogency of any argument of the “reproach to the jurisprudence” order may be doubted. The case, as a decision, stands for the proposition that the estate of the insured cannot recover after assignment although the assignee has precluded himself, by this misconduct, from recovering. The holding would properly have been the same if Hunter, instead of being the assignee, had been a beneficiary with a vested interest.

The Cleaver case, decided in 1891, was an offshoot from the famous “Maybrick’s Case.” The insurance was payable to a person to be named in the will of the insured. The insured bequeathed it to his wife. She was found guilty of murdering her husband, the insured, and prior to her trial, assigned her right to Cleaver. In the Queen’s Bench Division⁵⁴ it was held that the representatives of the insured could not recover because, according to the Married Women’s Property Act, they would have to hold the proceeds not as representatives of the insured, but as trustees for the wife. On this assumption, it was held that the clearest public policy prevented a recovery by them. Appeal was allowed by the Court of Appeal⁵⁵ where it was held that public policy should not prevent a recovery by the executors, as the question of public policy did not arise between them and the insurer; that it

⁵⁴ *Cleaver v. Mut. Rescue Fund L. Assn.*, 65 L. T. R. (N. S.) 220.

⁵⁵ (1892) 1 Q. B. 147.

would be time enough for public policy to interfere if the assignee of the wife should attempt to enforce the trust created by the Married Women's Property Act, i. e., that public policy does not relieve the insurer but renders the trust of the Married Women's Property Act incapable of performance. The case stands for the principle that where the beneficiary murders the insured, the estate of the insured can recover; but it must be borne in mind that the doctrine of *Lawrence v. Fox* does not obtain in England, and that the beneficiary there has no vested legal property in the contract, but at most only an equitable interest conferred by statute. It is clear that equity would not enforce the trust under the circumstances, and the legal property being in the executors, a judgment in their favor was proper. Apart from the doctrine of *Lawrence v. Fox*, the insured in this case having the right to change his will at pleasure, the beneficiary would have no vested right in any event.

In 1899 it was held in Illinois⁵⁶ that the death of the insured caused by manslaughter by the beneficiary was not enough to relieve the insurer even as against the beneficiary, as no homicide not intentional should bar the beneficiary's right. This, it is submitted, is the proper view, and not inconsistent with that asserted in the paper published in a previous number of this Review, that it is necessary to show, in cases of descent and devise, that the intentional wrongful killing was for the purpose of acquiring the property before equity can, by a constructive trust, prevent the wrongdoer from taking, descent and devise being wholly regulated by statute and therefore not subject to unexpressed public policy.

In a well considered Virginia case⁵⁷ it was held, in 1899, that murder of the insured by the assignee forfeits only the interest of the assignee,⁵⁸ and that the balance may be collected by the estate of the insured. This case is cited by one of the text writers⁵⁹ as holding that the insurer's liability is

⁵⁶ *Schreiner v. High Court*, 35 Ill. App. 576.

⁵⁷ *N. Y. L. Ins. Co. v. Davis*, (1899) 96 Va. 737, 32 S. E. 475.

⁵⁸ By statute in Virginia the assignee has a claim only for the amount necessary to reimburse him for the premiums he has paid.

⁵⁹ Cooley: *Briefs on Insurance*, p. 3154.

not terminated, but will be enforced for the benefit of the heirs or the estate of the insured. This is a misconception, as all the interest of the assignee was declared forfeited. It would be perfectly consonant with the case to hold that murder by a beneficiary with a vested interest would entirely relieve the insurer. In New York where the assignee gets the entire interest, it would be held, following the reasoning of the Virginia case, that the insurer's liability ceases altogether upon the murder of the insured by the assignee.

The question has been squarely presented to the Iowa Supreme Court⁶⁰ both the representatives of the insured and the assignee of the beneficiary being before the court. It was held that public policy does not relieve the insurer from its liability, and that the beneficiary being disqualified, the policy reverted to the estate of the insured. The beneficiary had no vested interest and the decision can be supported on this ground. In the course of the opinion the court remarked, however, that a constructive trust arose in favor of the insured's estate and drew an analogy to a lapsed legacy. The theory of constructive trust is only speciously correct as there was nothing to show that the murder was committed for the purpose of collecting the insurance. Perhaps it was suggested by the article of Professor Ames discussed in a previous number of this Review.

In a Tennessee case⁶¹ the policy was payable to the wife of the insured if she should survive him, otherwise to his representatives. The policy was given to the wife and she paid all the premiums out of her separate estate. Angered by her bringing suit for divorce, the insured shot and mortally wounded her and then committed suicide. He survived his wife some few hours. The contest was between the administrator of the beneficiary and that of the insured. It was held that the representative of the beneficiary should take, not by the terms of the policy, the insured having survived the beneficiary, but by virtue of an assignment to the beneficiary of the contingent interest of the insured, the assign-

⁶⁰ Schmidt v. Northern L. Assn., (1900) 112 Iowa 41, 83 N. W. 800.

⁶¹ Box v. Lanier, (1904) 112 Tenn. 393, 79 S. W. 1042.

ment being evidenced by his having given the policy to her and having told her it was hers; that the maxim, previously discussed, would prevent the administrator of the insured from taking. There is a strong dissenting opinion by Wilkes, J., who held that giving the policy to the beneficiary did not amount to an assignment, and that the estate of the beneficiary was estopped by the terms of the policy to claim that the tradition was tantamount to an assignment, beyond the interest given to her by the terms of the policy; that the insured having survived the beneficiary, that interest failed.

The Illinois Supreme Court has held⁶² that while murder by the beneficiary prevents recovery by him, it does not relieve the insurer altogether or prevent recovery by the next of kin of the insured. The rule is correct as applied to the facts before the court. The contract sued upon was a mutual benefit certificate. In such case the beneficiary has no vested right and the proceeds go to the insured's next of kin in the event of the nomination of a beneficiary outside of certain enumerated classes. The beneficiary by murdering the member places himself outside the classes authorized to take.

The question came up in a recent North Carolina case.⁶³ The contest was between the estates of the insured and of the beneficiary. The beneficiary had mortally wounded the insured and then had committed suicide. The beneficiary died shortly before the murdered insured. The insurance company admitted liability. The amount involved was very small. It was held for the estate of the insured. This decision is very peculiar and is probably to be explained by the fact that the insurer recognized its liability, as the remarks of the court indicate.

An unintentional and involuntary killing by the beneficiary, no matter how criminal, is not enough to defeat his right in the contract. It is not enough to allege in defense against his claim a felonious homicide, but murder is a sufficient allegation, as the purpose to kill is essential to murder in either degree.⁶⁴

⁶² *Supreme Lodge v. Menkhausen*, (1904) 209 Ill. 277, 70 N. E. 567.

⁶³ *Anderson v. L. Ins. Co. of Virginia*, (1910) 152 N. C. 1, 67 S. E. 53.

⁶⁴ *Filmore v. Metropolitan L. Ins. Co.*, (1910) 82 Oh. St. 208, 92 N. E. 26.

Preponderance of evidence is, of course, sufficient to establish the murder. Proof beyond a reasonable doubt is unnecessary.⁶⁵

The more important of the conclusions which the writer has drawn from the study of the various and often conflicting cases are these:

In the typical cases of wrongful act by insured—suicide or crime leading to execution—where the insurance is obtained with the intention of committing suicide or a capital crime, there can be no recovery for the death resulting from the suicide or from execution for the crime; but this is on grounds of fraud rather than of public policy. Where the insurance is not obtained with such intention, suicide or execution should not prevent recovery (the policy being silent on the subject) either by the estate of the insured or by the beneficiary, as the case may be.

In the case of the wrongful act of a third person interested in the policy, public policy should prevent recovery by the wrongdoer, but it is considered that to have this effect the wrongful killing must have been intentional. If the wrongdoer has the entire beneficial interest, it is submitted that his act should relieve the insurer entirely,⁶⁶ but if he is a beneficiary without a vested interest the estate of the insured should recover, and if he is only a partial assignee or assignee for security, the insurer should be relieved only to the extent of his interest.

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⁶⁵ *Jack v. Mutual Reserve*, (1902) 113 F. 49.

⁶⁶ However the authority, such as it is, is contra. See *Anderson v. L. Ins. Co. of Virginia*, *ubi supra*; *Metropolitan L. Ins. Co. v. Shane*, (1911) 98 Ark. 132, 135 S. W. 836; *Cooley*, *Briefs on Insurance*, p. 3154; *Joyce on Insurance*, Sec. 2851.